



July 10, 1991

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: EPA/State/Tribal Relations

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Associate Administrators
Staff Office Directors

Earlier this year I shared with you my views concerning EPA's Indian Policy, its implementation and its future direction. I would now like to further emphasize my commitment to the Policy by endorsing the attached paper that was coordinated by Region VIII on EPA/State/Tribal Relations.

This paper was prepared to formalize the Agency's role in strengthening tribal governments' management of environmental programs on reservations. The paper notes that the differences between the interests of tribal and state governments can be very sensitive and sometimes extend well beyond the specific issues of environmental protection. It reaffirms the general approach of the Agency's Indian Policy and recommends the strengthening of tribal capacity for environmental management. I believe the Agency should continue its present policy, making every effort to support cooperation and coordination between tribal and state governments, while maintaining our commitment to environmental quality.

I encourage you to promote tribal management of environmental programs and work toward that goal.

Please distribute this document to states and tribes in your region.

/S/ William K. Reilly

Attachment

cc. Headquarters Program Office Directors
Regional Office Directors

FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS

I. BACKGROUND

William Reilly, in his first year as EPA Administrator, reaffirmed the 1984 EPA Indian Policy and its implicit promise to protect the environment of Indian reservations as effectively as the Agency protects the environment of the rest of the country. The EPA Indian Policy is premised on tribal self-determination, the principle that has been set forth as federal policy by Presidents Nixon, Reagan, and Bush. Self-determination is the principle recognizing the primary role of tribal governments in determining the future course of reservation affairs. Applied to the environmental arena in the EPA Indian Policy, this principle looks to tribal governments to manage programs to protect human health and the environment on Indian reservations.

II. TRIBAL, STATE AND FEDERAL EXPECTATIONS

The Agency is sensitive to the fact that tribal and state governments have serious and legitimate interests in the effective control and regulation of pollution sources on Indian reservations. EPA shares these concerns and, moreover, has a responsibility to Congress under the environmental statutes to assure that effective and enforceable environmental programs are developed to protect human health and the environment throughout the nation, including Indian reservations.

Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining reservation land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others. For these reasons, Indian tribes have insisted that tribal governments be recognized as the proper governmental entities to determine the future quality of reservation environments.

State governments, in turn, recognize that the environmental integrity of entire ecosystems cannot be regulated in isolation. Pollution in the air and water, even the transportation of hazardous materials in everyday commerce, is not restricted to political boundaries. Accordingly, state governments claim a vital interest in assuring that reservation pollution sources are effectively regulated and, in many cases, express an interest in managing reservation environmental programs themselves, at least for non-Indian sources located on the reservations. In addition, some state officials have voiced the concerns of various non-Indians who live or conduct business within reservation boundaries, many of whom believe that their environmental or business interests would be better represented by state government than by the tribal government.

Although the Agency hears these particular concerns expressed most often through

tribal and state representatives, respectively, the Agency is aware that most of these concerns are shared by both tribes and states. For example, tribal governments are not alone in holding the view that future generations depend on today's leaders to manage the environment wisely. Many state officials argue the same point with the same level of conviction as tribal leaders.

Conversely, tribal governments share with states the awareness that individual components of whole ecosystems cannot be regulated without regard to management of the other parts. Tribal governments have also shown themselves to share the states' sensitivity to the concerns and interests of the entire reservation populace, whether those interests are the interests of Indians or non-Indians. In the Agency's view, tribes and states do not differ on the importance of these goals.

Where they differ at all, they differ on the means to achieve them. EPA fully shares with tribes and states their concerns for preservation of the reservation as a healthy and viable environment, for rational and coordinated management of entire ecosystems, and, thirdly, for environmental management based on adequate input both from regulated businesses and from the populace whose health the system is designed to protect. Moreover, the Agency believes that all of these interests and goals can be accommodated within the framework of federal Indian policy goals and federal Indian law.

III. EPA POLICY

The EPA Indian Policy addresses the subject of state and tribal roles within reservation boundaries as follows:

1. First, consistent with the President's policy, the Agency supports the principle of Indian self-government:

"In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carry out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments."

1. Second, the Agency encourages cooperation between state, tribal and local governments to resolve environmental issues of mutual concern:

"Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes or local units of government. Accordingly, EPA will encourage early communication and cooperation

among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the best interests of both."

IV. PRINCIPLES AND PROCEDURES FOR EPA ACTION

EPA program managers will be guided by the following principles and procedures regarding tribal and state roles in the management of programs to protect reservation environments.

- The Agency will follow the principles and procedures set forth in the EPA Policy for the Administration of Environmental Programs on Indian Reservations and the accompanying Implementation Guidance, both signed on November 8, 1984.
- The Agency will, in making decisions on program authorization and other matters where jurisdiction over reservation pollution sources is critical, apply federal law as found in the U.S. Constitution, applicable treaties, statutes and federal Indian law. Consistent with the EPA Indian Policy and the interests of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the Agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more reservation sources, the Agency will retain enforcement primacy for those sources. Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management. Where EPA retains such responsibility, it will carry out its duties in accordance with the principles set forth in the EPA Indian Policy.
- Under both authorized and EPA-administered programs for reservations, the Agency encourages cooperation between tribes and states, acting in the spirit of neighbors with a mutual self-interest in protecting the environmental and the health and welfare of the reservation populace. Such cooperation can take many forms, including notification, consultation, sharing of technical information, expertise and personnel, and joint tribal/state programming. While EPA will in all cases be guided by federal Indian law, EPA Indian Policy and its broad responsibility to assure effective protection of human health and the environment, the Agency believes that this framework allows flexibility for a wide variety of cooperative agreements and activities, provided that such arrangements are freely negotiated and mutually agreeable to both tribe and state. The Agency will not act in such a manner as to force such agreements.
- The Agency urges states to assist tribes in developing environmental expertise and program capability. The Agency has assisted in funding state

environmental programs for two decades, with the result that, today, state governments have a very capable and sophisticated institutional infrastructure to set and enforce environmental standards consistent with local state needs and policies. As the country now moves to develop an infrastructure of tribal institutions to achieve the same goals, state governments can play a helpful and constructive role in helping to develop and support strong and effective tribal institutions. The State of Wisconsin has worked with the Menominee Tribe to develop a joint tribal/state RCRA program that can serve as a model of mutually beneficial cooperation for other states and tribes.

- The Agency urges tribes to develop an Administrative Procedures Act (APA) or other means for public notice and comment in the tribal rule-making process. Many tribes now working with EPA to develop environmental standards and regulatory programs have already taken the initiative in establishing such techniques for obtaining community input into tribal decision-making. Such tribes have enacted APAs and held public meetings to gather input from both Indian and non-Indian residents of the reservation prior to setting tribal environmental standards for their reservations. The Agency generally requires states and tribes to provide for adequate public participation as a prerequisite for approval of state or tribal environmental programs. The Agency believes that public input into major regulatory decisions is an important part of modern regulatory governance that contributes significantly to public acceptance and therefore the effectiveness of regulatory programs. The Agency encourages all tribes to follow the example of those tribes that have already enacted an APA.
- Where tribal and State governments, managing regulatory programs for reservation and state areas, respectively, may encounter transboundary problems arising from inconsistent standards, policies, or enforcement activities, EPA encourages the tribal and state governments to resolve their differences through negotiation at the local level. EPA, in such cases, is prepared to act as a moderator for such discussions, if requested. Where a statute such as the Clean Water Act designates a conflict-resolution role for EPA in helping to resolve tribal/state differences, EPA will act in accordance with the statute. Otherwise, EPA will respond generally to such differences in the same manner that EPA responds to differences between states.

V. CONCLUSION

The Agency believes that where an ecosystem crosses political boundaries, effective regulation calls for coordination and cooperation among all governments having a regulatory role impacting the ecosystem. Many differences among tribes and states, like differences among states, are a natural outgrowth of decentralized regulatory programs; these differences are best resolved locally by tribes and states acting out of mutual concern for the environment and the health of the affected populace. EPA actions and decisions made in carrying out its role

and responsibilities will be consistent with federal law and the EPA Indian Policy.